APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 13, 2003

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1475

ABDUL MAJEED KHATTAK,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals, (A91-365-567)

Argued: April 2, 2003

Decided: June 13, 2003

Before WILKINS, Chief Judge, SHEDD, Circuit Judge, and Terry L. WOOTEN, United States District Judge for the District of South Carolina, sitting by designation.

Appendix A

OPINION

WILKINS, Chief Judge:

Abdul Majeed Khattak petitions for review of an order of the Board of Immigration Appeals (BIA) affirming without opinion an immigration judge's order denying Khattak's applications for asylum, withholding of deportation, and suspension of deportation. We deny the petition for review.

I.

Khattak is a Pakistani national who fraudulently entered Canada by using another individual's passport. He entered the United States in 1985 by crossing the border at Buffalo, New York without inspection. In 1988, he applied for temporary resident status under the special agricultural worker (SAW) amnesty program, which allows certain aliens who perform farm labor to obtain permanent residency in the United States. *See* 8 U.S.C.A. § 1160(a) (West 1999 & Supp. 2003). Khattak claimed in his application that he had performed qualifying agricultural work as an employee of Mumraiz Ahmad from August 15, 1985, until June 6, 1986. The Immigration and Naturalization Service (INS) initially granted Khattak's status adjustment request on September 27, 1988. However, on June 21, 1990, the INS notified Khattak of its intent to terminate his temporary-resident benefits. *See* 8 U.S.C.A. § 1160(a)(3)(B)(i) (allowing the INS to revoke an alien's temporary-resident status before he obtains permanent-resident status if the INS determines that the temporary-resident status was fraudulently obtained). The notice informed Khattak that an individual named Bahauddin

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Khan Khattak (Bahauddin) had pleaded guilty to several federal crimes stemming from his submission of numerous fraudulent legalization applications. The notice further stated that Bahauddin had named Khattak in a sworn statement as one of the foreign nationals for whom he had prepared a fraudulent application.

On July 16, 1990, Khattak responded to the INS' notice, denying that he had received fraudulent assistance from Bahauddin in preparing his SAW application or had even known that Bahauddin was involved in falsifying applications. Khattak also submitted two sworn statements from Ahmad, dated July 11, 1990, confirming that Khattak had worked for him on the relevant dates. Despite these submissions, the legalization office (LO) found that Khattak had obtained his temporary-resident status through fraud and thus revoked Khattak's status on September 19, 1990. Khattak subsequently appealed the revocation to the Legalization Appeals Unit (LAU), which dismissed his appeal on February 17, 1993, concluding that the clear preponderance of the evidence supported the decision of the LO.

On March 12, 1997, the INS issued an order to show cause charging that Khattak was deportable because he had been admitted to the United States as a nonimmigrant and had remained longer than permitted. Khattak conceded his deportability but sought asylum, withholding of deportation, and suspension of deportation. Khattak also sought to challenge the prior revocation of his temporary-resident status, but the immigration judge refused to accept evidence relating to that issue, ruling that he lacked jurisdiction to

review it. After reviewing the evidence concerning the other claims, the immigration judge found that Khattak had failed to establish entitlement to any of the relief he sought. The BIA affirmed the immigration judge's decision without opinion.

II.

In affirming the immigration judge's decision, the BIA employed a streamlined review procedure, put into place in October 1999, that allows a single BIA member to dispose of an appeal in summary fashion upon determining

> that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or
>
> (B) The factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii) (2003); *Rules and Regulations*, 64 Fed. Reg. 56,135 (Oct. 18, 1999). Khattak contends that he relied on his entitlement to three-member BIA review and a full BIA opinion when he conceded deportability in the immigration court. Because the streamlining procedure upset these expectations, Khattak contends that it is impermissibly retroactive. We disagree.

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A rule does not operate retroactively simply because it "upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). Rather, to have a retroactive effect, a statute must "attach[ ] new legal consequences to events completed before its enactment." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted). In determining whether a rule has a retroactive effect, courts should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (internal quotation marks omitted).

Here, the streamlined review procedure does not attach new legal consequences to events occurring before it was created. The new procedure does not alter the legal standards that are applied in reviewing the merits of appellants' claims. Rather, it affects only the body that adjudicates the claims. *Cf. Landgraf*, 511 U.S. at 274 (explaining that "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case'") (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

Relying on *Ballew v. Georgia*, 435 U.S. 223 (1978), Khattak contends that the streamlining procedures produce a retroactive effect because a smaller fact-finding body "results in a greater chance of an inaccurate result." Br. of Pet'r at 19. In *Ballew*, the Supreme Court held that trial by a five-person jury was unconstitutional, relying in part on empirical data suggesting that smaller juries do not find facts as accurately as larger ones. *See Ballew*, 435 U.S. at 232-39. Khattak suggests that the same must be true of smaller BIA panels.

Khattak offers no support for this leap in logic, however. BIA members are professionals who adjudicate immigration cases regularly, as contrasted with jurors, who are generally untrained in the law and for whom jury duty is an uncommon experience. Also, critically, the only appeals adjudicated by a single BIA member under the streamlining procedures are those that have been determined, in essence, to be the easiest cases. We simply have no reason to conclude that the size of the BIA panel makes any difference whatsoever in such appeals. *Cf. id.* at 237-38 (noting that increased accuracy in fact finding is most critical in close cases).

Nor is the BIA's issuance of a summary opinion, rather than a detailed one, a retroactive effect. Khattak suggests that a more detailed BIA opinion would have enabled him to "develop legal strategy and determine how the Board" analyzed the applicable law. Br. of Pet'r at 15. But Khattak already has received a full explanation of the immigration judge's decision, which is essentially the decision under review. *See* 64 Fed. Reg. at 56,138 (stating that when the streamlining regulations are employed, "[f]or purposes of judicial review, . . . the Immigration Judge's decision becomes the decision reviewed"). Had the BIA issued a detailed opinion, it would have simply substituted one reviewable decision for another. We therefore conclude that allowing summary opinions in clear cases is nothing more than a procedural change that does not affect substantive rights. *See Landgraf*, 511 U.S. at 275.*

* Khattak also contends that the immigration judge improperly discredited his testimony concerning the genuineness of an alleged religious conversion that was the basis of Khattak's request for (Cont'd)

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III.

In sum, for the reasons set forth above, we deny Khattak's petition for review.

PETITION FOR REVIEW DENIED

(Cont'd)

asylum. Khattak claimed that in 1995 he converted from the Sunni Muslim faith to the Ahmadi Muslim faith and that people practicing the latter religion face severe persecution in Pakistan. We conclude that the immigration judge's credibility determination was supported by substantial evidence. *See Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989).

Khattak further argues that the immigration judge erred in ruling he lacked jurisdiction to adjudicate Khattak's claim that his due process rights were violated because his temporary residency status was terminated without him being given an opportunity to confront and cross-examine Bahauddin. Khattak does not challenge the conclusion of the immigration judge that no applicable statute or regulation authorized him to consider whether Khattak was denied the right to due process when his temporary status was rescinded. And, he concedes that he was entitled to assert his due process challenge in federal district court. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-99 (1991) (holding that district court has jurisdiction over "general collateral challenges to unconstitutional practices and policies used by the [INS] in processing [SAW status] applications"). He nevertheless conclusorily asserts that denying him the right to make his due process challenge in the immigration court was "unconstitutional." We find no basis to support that conclusion.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS, U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED APRIL 4, 2002

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 365 567 - Arlington Date: APR 04 2002

In re: ABDUL MAJEED *KHATTAK*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patrick J. Cole, Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

s/ Frederick D. Hess
FOR THE BOARD

APPENDIX C — ORAL DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Arlington, Virginia

File No. A 91 365 567 November 20, 1997

In the Matter of

MAJEED ABDUL KHATTAK,

Respondent

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) - Overstay.

APPLICATIONS: Asylum under Section 208; Withholding of deportation under Section 243(h); Adjustment of status under Section 245; Suspension of deportation under Section 244; and Voluntary departure.

ON BEHALF OF RESPONDENT:

Harnam Arneja, Esquire
Attorney at Law

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ON BEHALF OF SERVICE:

Garciela Vasquez-Deschwartz, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 60-year-old male alien who is a native and citizen of Pakistan. He was last admitted to the United States at New York City on May 24, 1992, and he was admitted at that time as a non-immigrant special agricultural worker. He states that his original entry was in July of 1985.

These proceedings were commenced when an Order to Show Cause, dated March 12, 1997, was filed six days later with the Immigration Court on March 18, 1997. At a master calendar appearance before this Judge, the respondent admitted that he was a native and citizen of Pakistan and not a citizen of the United States. He admitted that he arrived as noted in New York City on May 24, 1992 for the last time as a non-immigrant special agricultural worker.

The respondent at that time also admitted that he was deportable under Section 241(a)(1)(B) as an overstay. This last admission concerning deportability and concession of deportability was made May 30, 1997.

Based on these admissions and on independent evidence in the record, I find that deportability has been established by clear, convincing and unequivocal evidence. 8 C.F.R. 242.14(a).

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The alien has applied for a variety of relief, and I will discuss each one in the discussion that follows.

There was considerable discussion about the respondent's application for lawful permanent residence under the SAW (Seasonal Agricultural Worker) Program, that he was initially granted relief by the Service and that was later revoked. I find that I do not have jurisdiction over this, to review this decision of the Immigration Service, except to note that his status under Section 245 was revoked. I am not taking into account any of the evidence submitted in that revocation, including affidavits from the alleged employer and other materials.

The central focus of his application is the asylum claim under Section 208 and withholding of deportation under Section 243H. I find that he has not met his burden of proof under these sections, and I'm denying those applications for relief.

I am also denying his applications for suspension of deportation under Section 244 and for voluntary departure, because I find that he does not have good moral character statutorily required for those two sections because he has fraudulently claimed to be a member of the Ahmadi religion in order to gain the benefit of asylum and withholding of deportation of the Immigration & Nationality Act.

At this hearing, I have considered the following evidence.

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The documents are as follows:

Exhibit 1 is the Order to Show Cause, dated March 12, 1997, supplemented by Exhibit 1-A, Form I-261, additional charge of deportability, which were later withdrawn by the Service.

Exhibit 2 is the asylum application on Form I-589, dated 8/10/95, and a page-and-a-half statement.

Exhibit 3 is the application for suspension of deportation on EOIR Form-40 and supporting documents.

Exhibit 4 is the more recent and second asylum application, dated 6/27/97, on Form I-589, and supporting documents.

Exhibit 5 is the application for adjustment of status, pursuant to Section 245A, concerning his adjustment and revocation and appeal of the SAW (Seasonal Agricultural Worker) based adjustment. As noted in the preliminary section above, I have not used any of this material in reaching my decision, except to note the simple fact that he was granted an adjustment and that was revoked by the Service.

I wish to emphasize that I am not using any of this material, in particular, the affidavit from Mumraiz Ahmad, farm contractor, since this individual was not present for examination and cross examination.

Exhibit 6-A(1) and (2) are copies of the United States Department of State Asylum Claims Report for Pakistan.

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Exhibit 6-B is the latest annual report from the United States Department of State on Human Rights Practices for Pakistan.

Exhibit 7 is a group of INS documents, including the assessment of respondent's asylum claim by the INS Asylum Office, dated March 28, 1996.

Exhibit 8 is the witness list prepared by the respondent's attorney, dated 26 September 1997.

Exhibit 9 are Ahmadi asylum background materials, submitted by the respondent's attorney.

Exhibit 10 is the one-page document concerning the promises given by a new member of the Ahmadi faith.

Exhibit 11 is the driver's license for Mr. Usman Ijaz.

The case was initially called for and heard on the merits on September 4, 1997. At that time, there was considerable discussion about the Court's jurisdiction over the Section 245 adjustment application, and as noted, I find that I do not have jurisdiction over that claim.

At the September 4, 1997 hearing, we also noted that the claim of asylum was paramount, and we would continue the hearing until October 6, 1997 to allow the respondent to present the best case possible, in particular, corroboration of his claim to be an Ahmadi.

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As a result, we met again on October 6, 1997 for the full merits hearing. At that time, we heard from the respondent, as well as Mr. Usman Ijaz, a representative of the local Ahmadi church. In addition, we noted that there were two other witnesses available to testify that they had seen the respondent at the Ahmadi church, and that they had attended functions together with the respondent. These gentlemen's names are Mr. Dud Ahmad Chaudri and Mr. Ishtiaq A. Khan. The Immigration Service accepted the proffer of proof that these gentlemen would testify as noted.

I do not believe that the respondent is a credible witness for reasons that I will discuss at greater length. In sum, I find that he has attempted to adopt the Ahmadi faith in an attempt to gain asylum and withholding of deportation in the United States.

Under Section 208, immigration judges are given the power in their discretion to grant applicants asylum who establish by a preponderance of the evidence that they were persecuted or that reasonable persons in their circumstances would have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Section-243H of the Act mandates withholding of deportation to a country where there is a clear probability that an alien's life or freedom is threatened on account of persecution resulting from the alien's race, religion, nationality, membership in a particular social group or political opinion. *INS v. Stevic*, 469 U.S. 407 (1984).

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The applicant bears the evidentiary burdens of proof and persuasion in any request for asylum under Section 208, withholding of deportation under Section 243(h). 8 C.F.R. 208.13(a).

The facts of the respondent's history before coming to the United States and his early immigration history are well summarized in the decision of the Asylum Office, dated March 28, 1996, which was the interview date. Briefly stated, the respondent is a member of the Pathan tribe, and he is a decedent and a member of a family of prominent leaders in the Sunni sect of Islam. He served from 1953 to 1976 in the Pakistani Army.

From 1976 to 1984, he lived in Saudi Arabia, where he worked as a safety, security and transportation supervisor for a construction company.

After he returned to Pakistan in 1984, he came almost immediately to Canada, after having obtained a fraudulent Pakistani passport. He then came illegally across the Canadian/United States border into the United States on July 1, 1985.

He adjusted his status to a temporary resident under the SAW (Seasonal Agricultural Worker) Program in 1988, and that status was revoked in a decision issued February 17, 1993.

The central issue presented in this case is whether the respondent's alleged conversion to the Ahmadi religion following the denial of his adjustment of status was and is

genuine. The respondent tells us that he has attended meetings of the Ahmadi faith since January of 1995, and he has attended meetings on an irregular basis because of his work schedule. He says on an average he goes every other week to the Ahmadi mosque. He claims that there is no ceremony as part of becoming an Ahmadi; one just accepts the principles of the religion. He admits that he has not studied the Ahmadi faith or movement very much because he is "too busy" in his work as a taxi driver. He claims that his family in Pakistan has been threatened and harmed because the respondent has joined the Ahmadi Movement, and that somehow local people there have learned about the respondent's conversion in 1995.

It must be emphasized that someone who is an Ahmadi in Pakistan runs the risk of being subjected to very severe penalties and sanctions. The State Department reports and the materials subjected by the respondent emphasize the fact that Muslim sects that make up the great majority of the population of Pakistan are vehemently opposed to the Ahmadis, and indeed have passed, in 1974, a constitutional amendment which declares that the Ahmadis are not Muslims.

There are criminal provisions, such as Section 295C of the Penal Code, added in 1986, which calls for a death penalty for persons blaspheming the Prophet Mohammed. This has been applied to Ahmadis because they say they believe in Prophet Mohammed, but in the opinion of the majority sects, this is blasphemy and can result in the death of Ahmadis.

Consequently, to successfully demonstrate that one is an Ahmadi in Pakistan would normally call for a clear grant of asylum under our laws.

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For that reason, the Ahmadi community itself has taken very strong attempts to safeguard the integrity of people that put forward as being members of the Ahmadi faith. In addition, the State Department notes that there has been a great deal of fraud going out by people who claim to be Ahmadis or emphasize the problems that they would have as Ahmadis. See, for example, Exhibit 6-A(2), page eight.

In assessing the respondent's credibility, I note that the respondent has repeatedly committed fraud in the past. He bought a false fraudulent passport in Pakistan which allowed him to get to Canada. He snuck across the border of the United States illegally in 1985 with plans to stay indefinitely (except for one or two short visits back home to Pakistan).

As already noted, the respondent was granted adjustment of status under Section 245, but that was revoked by the Immigration Service.

It is also significant that his work authorization was canceled in 1993, but that he has worked continuously for the last four years without authorization.

Although the respondent says that he was interested in the Ahmadi faith as early as the 1960's, it is significant to me that he claims only to have joined this religion a year or two after his Section 245 adjustment of status was revoked. If he was genuine in joining the Ahmadi religion, he would have done so, I believe, at a much earlier date than waiting until a very suspicious time, that he no longer has legal residence in the United States and is clutching at straws.

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It is also very significant that the Ahmadi representative stated that "96 percent of the Ahmadis are members of that religion as a result of their birth". This is not a religion, apparently, that attracts a great number of converts—only four percent, by the testimony of the official representative of the Ahmadi religion.

I have personally presided over hearings and granted asylum in at least six cases involving Ahmadis from Pakistan. In all six of those cases, to the best of my recollection, they were all individuals who were born into the Ahmadi religion and were Ahmadis all of their lives. Consequently, the fact that they were Ahmadis could and was in those cases verified by individuals in Pakistan or in the United States who knew that these people had been Ahmadis for many years, over the decades.

This present case is clearly distinguishable from those grants of asylum, all of which were agreed to by the Immigration Service and no appeal was taken. In the present case, the respondent was born into the Sunni religion and was a life-long member of that religion until just two years ago. Consequently, a great deal of the case turns upon whether the respondent has met his burden of showing that this was a genuine conversion.

As already noted, the respondent himself tells us that he has not studied the religion very much, and only attends the mosque every other week.

The representative from the Ahmadi church, Mr. Usman Ijaz, testified only to the outward signs of the respondent's

alleged conversion. For example, he said that the respondent had attended meetings and paid money to the group. Mr. Ijaz identified Exhibit 4-A as a photograph that the respondent took with a leader of the Ahmadi church.

Mr. Ijaz noted in this case that it was possible that anyone could pretend to be a member of the Ahmadi faith, and that he could not say if there was "a hidden agenda". Mr. Ijaz noted that "faith is within", and that Mr. Ijaz could not certify that the respondent's conversion to the Ahmadi religion was in fact genuine.

The Board of Immigration Appeals, in *Matter of Dass*, Int. Dec. 3122 (BIA 1989); and *Matter of S-M-J-*, Int. Dec. 3303 (BIA 1997) emphasized that the alien has the burden of proving eligibility for asylum and withholding of deportation. That burden has not been met in this case, even though the respondent has had ample time to prepare and is on notice of the suspicious nature of his "conversion". For example, the Immigration Service decision denying the application for asylum after the 1996 hearing, is a three-page, single spaced, very thorough and well-written document, noting the problems with the respondent's credibility on this key issue.

When the respondent came to his hearing in the Immigration Court on September 4, 1997, he had no corroborating witnesses, and I continued the case for a month, until October 6th, to give the respondent an opportunity to bring the necessary corroboration.

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At best, the Ahmadi representative and the two other gentleman who came could tell us only that the respondent, from the period of 1995 to the present, has occasionally attended the mosque, perhaps twice a month, and contributed money to the group. There is no showing that he has adopted the faith as a genuine matter. It is significant to me, at Exhibit 10, the statement of beliefs that someone must agree to before they become an Ahmadi, is simply a sheet of paper with no showing that the respondent ever signed this document as part of a ceremony and made a profession of faith. Exhibit 10 is just a listing of the beliefs of the Ahmadis. There's no showing that the respondent has genuinely accepted these beliefs.

In light of the wide-spread fraud concerning Ahmadi claims already noted by the State Department, in light of the respondent's long history of illegal activity based on supporting his continued residence in the United States, in light of the reluctance of the Ahmadi representative, Mr. Ijaz, to state clearly that the respondent is an Ahmadi (as opposed to someone who just comes to meetings), in light of the respondent's own admissions that he has not studied the religion or attended services on a regular basis because he is "too busy", I find that the respondent has failed to meet his burden of proof, as required by the statute, regulations and Board of Immigration Appeals' precedent decisions.

Consequently, the applications for asylum under Section 208 and withholding of deportation under Section 243H must be denied.

I am also denying the respondent's applications, as noted, for suspension of deportation under Section 244, and

voluntary departure, because I do not believe that he has again met his burden of showing that he has good moral character, since he has, in my finding, falsely claimed that he is an Ahmadi in an attempt to gain a benefit under the Immigration Act, that is asylum and withholding of deportation.

Consequently, the following orders are entered:

ORDER

IT IS HEREBY ORDERED that the applications for asylum, withholding of deportation, suspension of deportation and voluntary departure are all denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the United Kingdom, or, in the alternative, to Pakistan, on the charge set forth in the Order to Show Cause.

PAUL NEJELSKI
United States Immigration Judge